

## The »Third Tier« in Austria: Legal Profiles and Trends of Local Government

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Unlike other constitutions, the Austrian Federal Constitution not only recognizes the municipalities (*Gemeinden*) explicitly, but also regulates their organisation and functions in principle, whilst details are left to the legislation of the nine *Länder*.\*\* In accordance with the European Charter of Local Self-Government, all local authorities are elected democratically, deriving their mandate either directly or indirectly from the local citizens. Numerous local functions are performed on an autonomous basis, where local authorities cannot be bound to instructions, although they are under state supervision. Whereas the constitutional status of the municipalities does not generally approach that of the *Länder*, they are recognised as a »third partner« in the system of fiscal equalisation and national budgeting, where co-operation between the federation, the *Länder*,

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\*\* The terms *Land*, *Länder*, and the abbreviations of different Austrian laws have been kept in their original form for the purpose of better understanding of the text.

and the municipalities is closer than in other areas. Their general admittance to the traditional »dual system« of Austrian federalism is still refused, though.

*Key words:* Austria; local government; fiscal equalisation; municipal bodies; three-layered federalism; local autonomy; local democracy

## I. Introduction

The changing role of local government in multi-tier systems has received much attention lately due to increased needs of public services at the level that is closest to the citizens, (Loughlin, 2001; Delcamp/Loughlin, 2002; Steytler, 2005a; Kincaid, 2005: 438; Blindenbacher/Pasma, 2007; Gamper, 2006: 77). According to some authors, a redefinition of the relations between local government and other tiers of government seems to be inevitable (Steytler, 2005b: 8; Weber, 2005: 415), although this may give rise to tensions, particularly from the point of view of the regions. In Europe, the Charter of Local Self-Government, which has been ratified by 43 states so far, proves to be an efficient instrument of guaranteeing minimum standards of local government protection in the context of a nation state (Schefold, 2007: 1057).

Within a multi-tier system, be it of federal or highly regionalized nature, the role and place of local government in relation to both, the federal (central) government and the regional governments need particular legal or even constitutional recognition. Whereas the classical theory of federalism at its outset focussed on the relationship between federation and constituent units (»dual system of government«) (Weber, 2005: 415), it has nowadays been acknowledged widely that local government is a distinctive part of a multi-tier-system,<sup>1</sup> even though several differences between the federal and regional levels, above all the lack of law-making powers, are still undeniable (Gamper, 2006: 82).

Whereas in some federal states there is just one tier of local government, in others there may be different local tiers (municipalities, districts, metropolitan regions etc.) (Steytler, 2005b: 4). Moreover, there are several cases where local and regional governments may overlap. This is some-

<sup>1</sup> Paradigmatically, section 40 paragraph 1 of the Constitution of South Africa: »In the Republic, government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated.«

times the case with strong metropolitan municipalities, historic city-states, or capitals if they are simultaneously municipalities and constituent states (Blindenbacher/Pasma, 2007). In any case, the constitutional or at least legal recognition of local government, its organisational structure and functions, finances, as well as the extent of municipal supervision need to be examined more closely if the role and place of local government are to be evaluated.

## II. Constitutional Recognition

Federal constitutions differ as to whether they accord constitutional status to local government or whether they let the constituent units to decide on its status (Kincaid, 2005: 438). Regardless whether local government is explicitly entrenched in a federal constitution; it is normally a competence of the constituent units to adopt the more detailed provisions on local government (Watts, 1999: 40).

The Austrian Federal Constitution<sup>2</sup> not only explicitly recognizes local government, i.e. the municipalities, but also contains a number of more substantive provisions that form the constitutional framework for all kinds of ordinary laws that entrench local government in more detail. From a comparative perspective, therefore, the status of local government in Austria is better protected than in a wide range of other federal constitutions, since it has a broad and explicit constitutional basis.<sup>3</sup>

## III. Types of Local Government

According to article 2 B-VG, Austria is a federal state that consists of nine constituent *Länder* (Burgenland, Carinthia, Lower Austria, Salzburg, Styria, Tyrol, Upper Austria, Vienna, Vorarlberg). Local government is

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<sup>2</sup> The Austrian Federal Constitution consists of a main document, i.e. the Federal Constitutional Act (*Bundes-Verfassungsgesetz*, hereinafter B-VG), but also of a number of additional federal constitutional acts, single federal constitutional provisions within ordinary federal laws and several laws dating back to the former Austro-Hungarian monarchy (until 1918), which, as well as certain state treaties, were given the status of federal constitutional laws. The number of these additional sources of constitutional law has now been reduced considerably (see BGBl I 2008/2).

<sup>3</sup> However, this goes hand in hand with a reduction of regional power to shape local government (Gamper, 2006: 80).

not mentioned in this fundamental entrenchment of federalism (Pernthaler, 2004: 300; Weber, 1999a). However, the chapter entitled »Municipalities« (*Gemeinden*) determines local government *in extenso*. Article 116 B-VG stipulates that municipalities constitute each *Land* and that each municipality is both a territorial body of its own, enjoying the right of autonomous self-government, and an administrative unit.

Without being recognized as constituent units of the federal system, the municipalities constitute the lowest (third) territorial tier in Austria. Since district administrative agencies (*Bezirksverwaltungsbehörden*) and intermunicipal associations (*Gemeindeverbände*) (Weber, 2007; Havranek/Kemptoner, 2008) are not independent territorial bodies according to the prevailing opinion, there is no other type of territorial entity below the *Land* tier but the municipalities. Hence, when the term »local government« is used in the following context, it always refers to the municipalities.

The Federal Constitution does not generally distinguish between different kinds of municipalities, but follows the »principle of municipal uniformity«, which means that legally municipalities are regarded as equal, irrespective of their size, population, and economic situation. Nevertheless, some municipalities are given a particular status determined by the Federal Constitution itself. According to article 116 paragraph 3 B-VG, a municipality with at least 20,000 inhabitants may, if *Land* interests are not thereby jeopardized, apply for its own statute. Such a statute is a specific kind of *Land* law that needs the approval of the Federal Government. If the Federal Government does not, within eight weeks, inform the *Land* Governor of its veto, the statute enters into force.

Presently, 15 towns have statutes of their own, mostly because they are *Land* capitals or for historic reasons (Walter/Mayer/Kucsko-Stadlmayer, 2007: 416), but the option is open also to other municipalities if the aforementioned conditions are met. The difference between »ordinary« municipalities and towns with their own statute is twofold. Firstly, article 116 paragraph 3 B-VG imposes on the latter the obligation to carry out those administrative tasks within their territory that are usually performed by district administrative agencies. Secondly, the Federal Constitution uses slightly different terms when speaking of the same local authorities, depending on whether it is an »ordinary« municipality, a town, or a town with its own statute.<sup>4</sup> Another asymmetry is stipulated by article 127a

<sup>4</sup> Cf. article 117 paragraph 1 b) (»City Senate« instead of »Local Board«) or article 117 paragraph 7 B-VG (»Magistrate« instead of »Local Office«).

paragraphs 1 and 3 B-VG, according to which municipalities with at least 20,000 inhabitants are subject to auditing performed by the Court of Auditors. A special constitutional status is accorded to Vienna as it is not merely a municipality, but also the capital of Austria and a *Land*.<sup>5</sup> Finally, the »principle of municipal uniformity« does not apply to fiscal equalisation since municipalities receive different revenues depending on the number of inhabitants.<sup>6</sup>

Furthermore, article 120 B-VG provides a possible basis for the future establishment of so-called »regional municipalities« (*Gebietsgemeinden*) pending on a future constitutional amendment (which has not been enacted yet). Unlike the district administrative agencies that are headed by an appointed senior civil servant with legal qualification, the »regional municipalities« would constitute directly elected authorities (Demmelbauer/Pesendorfer, 1980; Neuhofer, 1998: 577 and Kahl, 2006a).

## IV. Local Government and the Allocation of Powers

Articles 115–120 B-VG mainly determine the organisation of municipalities, their bodies, functions and the relations between them and the federation or the *Länder* respectively. Article 115 paragraph 2 B-VG generally entitles (and obliges) *Länder* legislation to set up more detailed rules pertaining to municipalities, save where competence on the part of the federation is expressly stipulated.<sup>7</sup> Although the *Länder* – and not the federal legislature – are thus regularly competent to adopt legislation on local government, their legislation is bound to the extensive set of rules pertaining to municipalities that are established by the Federal Constitution itself. Apart from the B-VG, another federal constitutional act is of particular importance in this context: under the Fiscal Constitutional Act<sup>8</sup> municipalities are, if only in principle, allowed to raise taxes and to receive revenues – a more detailed settlement is made by the Fiscal Equalisation Act, which is usually re-enacted every four years in order to adapt it to

<sup>5</sup> Art. 108 – 112 B-VG.

<sup>6</sup> See below and, in more detail, the new Fiscal Equalisation Act (*Finanzausgleichsgesetz* 2008, BGBl I 2007/103).

<sup>7</sup> See article 116a paragraph 2, article 118 paragraph 7 and article 119a paragraph 3 B-VG.

<sup>8</sup> BGBl I 1948/45 as amended by BGBl I 2007/103.

the current financial situation.<sup>9</sup> Moreover, two constitutional concordats, both of which seek to co-ordinate their fiscal relations, were concluded between the federation, the *Länder* and, on behalf of the municipalities, the Austrian Association of Towns and the Austrian Association of Municipalities.<sup>10</sup>

At the *Länder* level, both the *Länder* constitutions and ordinary *Länder* legislation deal with local government in adherence to the federal constitutional rules. Adherence means that the federal constitutional rules are repeated or implemented in a more or less detailed manner. With regard to the *Länder* constitutions, however, the federal Constitution allows some sub-constitutional space that is called the »constitutional autonomy« of the *Länder* (Pernthaler, 2004: 459). According to this principle, the *Länder* are allowed to legislate freely – also with respect to local government – unless this would violate federal constitutional law. This clause enormously restricts the *Länder's* autonomous space, since the federal Constitution not only provides a wide range of explicit rules that must be adhered to, but also several implicit principles that are somewhat unpredictably applied by the Constitutional Court.<sup>11</sup>

Within this framework, *Land* constitutional legislation usually determines the rearrangement of the local territory, the electoral process at the local level, local taxes, the representation of local interests in the *Land* legislative procedure and the municipalities' right to initiate legislation, plebiscites and opinion polls.

The *Länder* have also adopted a number of ordinary laws in order to implement the rules set up by the Federal Constitution and by their own constitutions respectively, including Local Government Acts, Town Statutes, Intermunicipal Associations Acts, Local Election Acts, and Local Civil Servants Acts.

## V. The Functions of Local Government

### 1. General Remarks

According to the Federal Constitution, municipalities are not merely administrative units, but also autonomous bodies with the right to self-govern-

<sup>9</sup> Cf., most recently, BGBl I 2007/103.

<sup>10</sup> See below.

<sup>11</sup> Cf., in particular, VfSlg 16.241/2001.

ment (Pernthaler, 2004: 213). Local self-government denotes the right and the ability of local authorities, within the limits of the law, to regulate and manage a substantial share of public affairs under their own responsibility and in the interests of the local population.<sup>12</sup> In addition to their autonomous powers the Austrian municipalities are responsible for a number of delegated functions. If the municipalities perform functions within their autonomous sphere, they cannot be bound to instructions of federal or *Länder* authorities, although they are subject to their supervision. Within their delegated sphere of functions, however, they are bound to instructions given by the federal or *Länder* authorities.

It should be noted, however, that even within their autonomous sphere of functions municipalities do not have original competences of their own since it is inherent in every federal system that competences are shared only between the federation and the *Länder*. The administrative tasks which are performed by municipalities – whether falling within their autonomous or delegated sphere of functions – in *any* case belong to either a federal or a *Länder* competence and have to be conferred to them explicitly by the relevant federal or *Länder* laws.

## 2. Autonomous Functions

The rationale of autonomous functions, as it is given in article 118 paragraph 2 B-VG, is the principle of subsidiarity (Pernthaler, 2004: 216; Weber, 1999d; Stolzlechner, 2004a). In accordance with this principle, the autonomous sphere of local functions consists of those tasks that are exclusively or preponderantly the concern of a municipality and suited to performance by a local community within its local boundaries. The autonomous sphere also comprises the municipalities' capacity to act as persons under private law and as independent economic bodies entitled to possess all kinds of property within the general framework of the law and to run economic enterprises (article 116 paragraph 2 B-VG and Binder, 2008).

Further to that, article 118 paragraph 3 B-VG enlists particular matters that belong to the municipalities' autonomous sphere, such as the settlement of the internal arrangements for the performance of local functions, the appointment of local authorities and local civil servants, local security, local traffic police, local market police, local building police, local fire control, public decency, local sanitary police, etc. This list is not exhaus-

<sup>12</sup> Cf. also article 3 paragraph 1 of the Charter of Local Self-Government.



tive, but concretizes the most important fields of those comprised by the general clause *in abstracto*. The municipalities, however, cannot perform these tasks directly on the basis of article 118 B-VG. Instead, the federal and *Länder* laws that, according to the allocation of powers, regulate the administrative fields falling into the municipalities' autonomous sphere, have to authorize them explicitly. If these laws omit doing so, they are unconstitutional, even though they remain in force until the Constitutional Court repeals them.<sup>13</sup>

An exception to the general rule that autonomous functions must not be performed without a specific enabling clause in either a *Land* or a federal law is the so-called »local police ordinance« (*ortspolizeiliche Verordnung*) (Weber, 1999d; Stolzlechner, 2004a): According to article 118 paragraph 6 B-VG, a municipality is entitled, in matters pertaining to the autonomous sphere of local functions, to issue local police ordinances on its own initiative for the prevention of imminent, expected, or existing nuisances interfering with local communal life, as well as to declare non-compliance with them in an administrative contravention. However, although such ordinances may be issued directly on the basis of article 118 paragraph 6 B-VG, they must not contravene federal or *Land* legislation.

Although municipalities cannot be bound to instructions of federal or *Länder* authorities within their autonomous sphere, they are supervised by the district administrative agencies in the first instance, and in the last instance by the *Land* Government on behalf of the *Länder* and by the *Land* Governor on behalf of the federation (Hauer, 2008). According to article 119a paragraph 1 B-VG, however, supervision applies only to the aspect of lawfulness. Namely, as to whether local authorities infringe laws and ordinances, in particular whether they exceed their sphere of functions and if they perform their legal duties. In addition to this instrument of legal control, the *Länder* – but not the federation – are entitled to audit the financial handling of a municipality with respect to its economy, efficiency, and expediency. Within three months after the result of the audit has been conveyed to the mayor for submission to the local council, the mayor has to inform the supervisory authority on the measures taken as a consequence of the audit.<sup>14</sup>

<sup>13</sup> Cf. VfSlg 6944/1972, 8719/1979. An exception to this rule is the private sector where municipalities do not require explicit authorisation (article 116 paragraph 2 B-VG; cf. VfSlg 17.557/2005).

<sup>14</sup> Article 119a B-VG.



Moreover, the supervisory authority is entitled to inform itself about every kind of local business.<sup>15</sup> Municipalities are bound to impart the information demanded in individual cases by the supervisory authority and to allow examinations to be conducted on the spot. Insofar as the competent legislature contemplates the dissolution of the local council as a supervisory expedient, this measure rests with the respective *Land* government in exercise of the *Land's* right of supervision, and with the *Land* governor in exercise of the federation's right of supervision. The admissibility of effecting a substitution shall be confined to cases of absolute necessity. Supervisory expedients shall be applied with greatest possible consideration for third parties' acquired rights.<sup>16</sup>

Whoever alleges infringement of their rights through a decree of a local authority in matters pertaining to its autonomous sphere of functions can, after exhausting all channels of (ordinary) appeal, within two weeks after issuing of the decree lodge an (extraordinary) appeal against it to the supervisory authority.<sup>17</sup> The latter shall rescind the decree if the rights of the intervenor have been infringed by it, and refer the matter back to the municipality for a new decision. The municipality, however, has the status of a party to the supervisory proceedings and may file another (extraordinary) appeal against the decree of the supervisory authorities either to the Administrative Court or to the Constitutional Court.<sup>18</sup>

If municipalities have issued ordinances in their autonomous sphere of functions, they shall without delay advise the supervisory authority accordingly.<sup>19</sup> The supervisory authority shall, after a hearing of the municipality, rescind ordinances which are contrary to law and simultaneously advise the municipality of the reasons.

Individual measures to be taken by a municipality in its own sphere of competence, which to a special degree affect supra-local interests, particularly such as have a distinct financial bearing, can be tied by the competent (federal or *Länder*) legislature to a sanction on the part of the supervisory authority. Only a state of affairs which unequivocally justifies

<sup>15</sup> Article 119a paragraph 4 B-VG.

<sup>16</sup> Article 119a paragraph 7 B-VG.

<sup>17</sup> Article 119a paragraph 5 B-VG.

<sup>18</sup> Article 119a paragraph 9 B-VG.

<sup>19</sup> Article 119a paragraph 6 B-VG.

the preference of supra-local interests may come into consideration as a reason for withholding the sanction.<sup>20</sup>

On application by a municipality, the performance of certain specified matters in its autonomous sphere can be assigned by ordinance of the *Land* government or by ordinance of the *Land* governor to a *Land* authority. Insofar as such an ordinance is meant to assign competence to a federal authority, it requires the approval of the Federal Government.<sup>21</sup>

### 3. Delegated Functions

According to article 119 paragraph 1 B-VG, the delegated sphere of local functions comprises those non-autonomous tasks which municipalities have to perform in adherence to federal and *Länder* laws that delegate these tasks to them (Kahl, 2006b; Weber, 1999e).

In this case, the municipalities are subject to instructions given by federal or *Länder* authorities. Within the general framework of the Federal Constitution, it entirely depends on the competent legislature to decide whether an administrative task is delegated to the municipalities. In contrast to the tasks assigned to the municipalities' autonomous sphere, the Federal Constitution neither enumerates the tasks falling into the delegated sphere nor entrenches them in a general clause. With regard to delegated sphere of functions, municipalities do not have the right of self-government, but serve as mere administrative units.

Pursuant to article 119 paragraph 2 B-VG, the mayor is competent to perform delegated tasks, being bound to instructions given by federal or *Land* authorities. The mayor may refuse compliance only if the instruction was given by an authority not competent in the matter or if compliance would infringe the criminal code.<sup>22</sup> The mayor can transfer individual categories of matters pertaining to the assigned sphere of functions to members of the local board, or to certain other local authorities for performance in his/her name if the matters are factually connected to matters pertaining to the municipality's autonomous sphere of competence. In these matters the authorities concerned (or their members) are bound to the instructions of the mayor.

<sup>20</sup> Article 119a paragraph 8 B-VG.

<sup>21</sup> Article 118 paragraph 7 B-VG.

<sup>22</sup> Article 20 paragraph 1 B-VG.

## VI. The Organisation of Local Government

### 1. General Remarks

Under article 117 B-VG, the authorities of each municipality shall at least include the local council (*Gemeinderat*), being a representative body that is elected by those entitled to vote in the municipality, the local board (*Gemeindevorstand*), also known as the city council (*Stadtrat*) or as the city senate (*Stadtsenat*) in towns with their own statute, and the mayor (*Bürgermeister*) (Stolzlechner, 2001e; Steiner, 2008).

The Federal Constitution establishes that both the local council and the local board are collegiate bodies, whereas the mayor is a monocratic organ. *Länder* legislation is entitled to enlarge this »minimum institutional standard« by establishing other local authorities<sup>23</sup> or by authorizing municipalities to do so.

*Länder* legislation is moreover competent to provide more detailed rules with regard to the specific functions of local authorities; accordingly, the Local Government Acts and Town Statutes contain such provisions. They may also expressly authorize municipalities to issue an ordinance if competences need to be transferred to an authority other than that originally provided by law.

### 2. The Local Council

As the details of the organisation and competences of local authorities depend on the respective Local Government Act or Town Statute of a *Land*, these rules may differ from *Land* to *Land*. Generally, the local council and the mayor are the organs which are the most important in practice. The local council is a general representative body, which, as the Federal Constitution stipulates, is elected by all local citizens entitled to vote according to the principles of equal, direct, secret, and personal suffrage on a proportional basis (Oberndorfer/Trauner, 2008),<sup>24</sup> also including EU citizens. It depends on the individual Elections Acts and on the dura-

<sup>23</sup> Such as the local office (*Gemeindeamt*, *Stadtmagistrat*), the chief magistrate (*Ortsvorsteher*), specific commissions etc.

<sup>24</sup> Article 117 paragraph 2 B-VG establishes the principles applying to the election procedure which resemble the principles applying to elections to the National Council (which is the lower house of the Federal Parliament) and to the *Länder* Parliaments.

tion of residence whether also those Austrian citizens that have their residence, but not their principal domicile, in a municipality may take part in the local elections. Usually, a simple majority of the members present in sufficient numbers to form a quorum is requisite to a vote by the local council.<sup>25</sup>

Still, local council is no parliament, since it has no legislative powers and merely represents the citizens of a sub-state entity. However, it is competent to deliberate and decide on a wide range of issues pertaining to the autonomous sphere, including budgetary questions. Article 118 paragraph 5 B-VG stipulates that the mayor, the members of the local board and appointed local officials are responsible to the local council for the performance of their functions relating to the municipality's autonomous sphere. The local council thus serves as the supreme local body regarding those functions that are exercised in the autonomous sphere. Although this is not expressly stipulated by the Federal Constitution, the Local Government Acts of the *Länder* regularly vest local councils with residuary competence meaning that they are entitled to perform all tasks which no other body is explicitly competent to perform.

### 3. The Mayor

The mayor is the body that represents a municipality externally, in particular with regard to private law matters. If the mayor performs administrative tasks pertaining to the municipality's autonomous sphere, he/she is responsible to the local council (Trauner, 2008).<sup>26</sup> The tasks pertaining to the municipalities' delegated sphere generally have to be performed by the mayor<sup>27</sup> who is entitled, however, to transfer – without detracting from his responsibility – individual categories of matters pertaining to the delegated sphere of local functions to other local authorities on account of their factual connection with matters pertaining to the municipality's autonomous sphere of functions. In these matters, the authorities concerned are bound by the instructions of the mayor. As a rule, the mayor is the president both of the local council and of the local board. Moreover, he/she is the head of the local office and local civil servants. The mayor also manages the local property and budget.

<sup>25</sup> Article 117 paragraph 3 B-VG.

<sup>26</sup> Article 118 paragraph 5 B-VG.

<sup>27</sup> Article 119 paragraph 2 B-VG.

Formerly, the Federal Constitution did not explicitly allow for a direct election of the mayor. *Land* legislation that had provided such a system was declared unconstitutional by the Constitutional Court in 1993.<sup>28</sup> However, in order to enable the *Länder* to decide in favour of a direct election system, the Federal Constitution was amended in 1994.<sup>29</sup> Article 117 paragraph 6 B-VG now stipulates that the mayor is elected by the local council, unless a *Land* constitution provides that he/she is to be elected by those entitled to elect the local council (i.e. the local citizens entitled to vote according to article 117 paragraph 2 B-VG). This explicit provision enlarges the constitutional autonomy of the *Länder* as it is now left to their constitutional law to stipulate whether the mayor is elected by the local council or directly by the local citizens (Gamper, 2007: 558). So far, six (out of nine) *Länder* have adopted laws that provide for the direct election of the mayor, although they sometimes exclude towns with their own statute.

#### 4. Other Local Authorities

The electoral parties represented in the local council have a claim to representation in the local board in accordance with their strength.<sup>30</sup> The Federal Constitution does not determine which tasks the local board is responsible for, but mentions its members among those that are responsible to the local council when performing autonomous tasks.<sup>31</sup> According to article 119 paragraph 3 B-VG, the mayor may also confer the tasks belonging to the delegated sphere to members of the local board who, in this case, are bound to the mayor's instructions and responsible for any illegality.

Article 117 paragraph 7 B-VG stipulates that the local office has to perform »local business« This provision, however, is not to be understood as if it would itself confer the powers of an authority upon the local office. Basically, the local office is meant to assist local authorities in performing »local affairs«, which, in principle, means all local tasks, whether pertaining to public administration, private law, or to the autonomous or delegated sphere of local functions.

<sup>28</sup> VfSlg 13.500/1993.

<sup>29</sup> BGBl 1994/504 (cf. also Novak, 1995).

<sup>30</sup> Article 117 paragraph 5 B-VG.

<sup>31</sup> Article 118 paragraph 5 B-VG.

In contrast to other municipalities, Vienna and Graz are divided into districts, the inhabitants of which are represented in sub-municipal district assemblies. In 2004, the Constitutional Court repealed a provision of the Local Elections Act enacted by the Viennese *Land* parliament that entitled non-Austrian (and non-EU) citizens to vote in the elections to the district assemblies if they had had their permanent residence in Vienna for at least 5 years.<sup>32</sup> The Constitutional Court held that the district assemblies were general representative bodies (such as the National Council, the *Länder* Parliaments, or the local councils), and that the elections to all general representative bodies had to follow homogeneous constitutional principles. According to the Constitutional Court, all elections to general representative bodies relate to article 1 B-VG (»Austria is a democratic republic. Its law emanates from its people.«), which embodies the fundamental principle of representative democracy so that the »Austrian people« means »all federal citizens«. Since Austrian citizenship is explicitly demanded as a precondition by the Federal Constitution only with regard to elections to the National Council, to the *Länder* Parliaments and the local councils, it is at least doubtful whether this parameter also applies to elections to the Viennese district assemblies. Such a strong idea of homogeneity again restricts the constitutional autonomy of the competent *Land* legislature, which, in its turn essentially belongs to the principle of federalism and does not meet the modern approaches towards an extension of the right to vote to all persons with a permanent residence in a municipality (Gamper, 2007: 566).

## VII. Citizens' Participation

Within a multi-tier state, the local level is surely the most amenable to citizen participation since it is much easier to organize citizens' initiatives and to confront familiar politicians with their issues of interest. It is also notable that the strengthening of direct democracy at the local level has increasingly become a political demand. It has also been enshrined in law, including even federal constitutional law.<sup>33</sup>

<sup>32</sup> VfSlg 17.264/2004.

<sup>33</sup> The principle of democracy in Austria is nevertheless considered to entrench representative democracy as the main model (Pernthaler, 2004: 73; Walter/Mayer/Kucsko-Stadlmayer, 2007: 78; Öhlinger, 2007: 157; Oberndorfer, 2008).

Art. 117 paragraph 8 B-VG determines that *Länder* legislation can, in matters pertaining to the municipalities' autonomous sphere of functions, provide for the direct participation and assistance of those entitled to vote in the local council election (Stolzlechner, 2001e). In contrast to the direct election of the mayors, provisions relating to citizens' participation do not need to be embodied in the *Länder* constitutions – an ordinary *Länder* law is sufficient. Accordingly, the Local Government Acts of the *Länder* include provisions regarding local plebiscites (referenda, public opinion polls), citizens' meetings and participation in select committees of the local council.

## VIII. Economic and Fiscal Relations

### 1. The Economic Activities of Local Government

Each municipality is an independent economic entity. Pursuant to article 116 paragraph 2 B-VG a municipality is entitled, within the limits of the ordinary laws of the federation and the *Länder*, to possess assets of all kinds, to acquire and to dispose of such at will, to operate economic enterprises as well as to manage its budget independently within the framework of the Fiscal Constitutional Act, and to levy taxes (Weber, 1999c). In addition to article 17 B-VG – according to which both the federation and the *Länder* are allowed to act under private law without any restrictions arising from the allocation of competences (Korinek/Holoubek, 1993) – the municipalities are thus given the right to deal under private law as well.

The tasks enumerated in article 116 paragraph 2 B-VG form the basis of what is called the »freedom of economic activities« of municipalities (Weber, 1999c). Article 118 paragraph 2 B-VG expressly stipulates that these issues belong to the municipalities' autonomous sphere. It has, however, been difficult to construe the clause »within the limits of the ordinary laws of the federation and the *Länder*«, namely as to whether a municipality is legally bound to the same extent as any other private person (i.e. merely by federal or *Länder* laws in general) or whether it can be obliged specifically to engage in business, particularly with regard to public services. According to the ruling doctrine, the freedom of economic activities is at least subject to several federal constitutional bounds, such as the principle of economy, efficiency, and expediency, and the criteria of the autonomous sphere of functions and fundamental rights. Ordinary federal or



*Länder* laws are legally admissible if they concretize these constitutional bounds, but a municipality may have private law dealings also if no such law exists.<sup>34</sup>

## 2. Intergovernmental Relations in Fiscal Federalism: Towards a Three-Layered System of Federalism?

The B-VG does not regulate fiscal relations but explicitly refers to the Fiscal Constitutional Act (*Finanz-Verfassungsgesetz*, hereinafter F-VG)<sup>35</sup> which is a constitutional law of its own (Ruppe, 2000; Pernthaler, 1984; Pernthaler, 2004: 391). Pursuant to § 2 F-VG, municipalities have to cover the expense which accrues from the performance of their tasks, whether they belong to their autonomous or delegated sphere of functions, unless federal or *Länder* laws stipulate otherwise (Buchsteiner, 1998).<sup>36</sup> Such laws, however, must not contravene § 4 F-VG, which embodies the principle of fiscal equality. It obliges federal or *Länder* laws to heed the limits of efficiency of each territorial entity and the distribution of public tasks between them.

Pursuant to § 6 F-VG, municipalities are entitled either to levy exclusive local taxes or to share taxes with the federation and/or the *Länder* according to various distribution keys. Pursuant to § 7 F-VG it is the competence of the federal legislature to regulate shared federal taxes, to declare specific taxes to be exclusive local taxes and to authorize municipalities to levy certain taxes on account of resolutions issued by the local council. *Länder* legislation is mainly competent to determine shared *Länder* taxes and exclusive local taxes (in general), but not without considering the financial viability of municipalities.<sup>37</sup> It may also authorize municipalities to levy certain taxes on account of resolutions passed by the local council and even oblige them to levy certain taxes if the budgetary position of municipalities requires it.

The F-VG also provides that financial allocations may be granted to municipalities both by the federation and the *Länder*, either in the form of rate support grants or allotments in accordance with specified require-

<sup>34</sup> Cf. also VfSlg 17.557/2005.

<sup>35</sup> BGBl 1948/45 as amended by BGBl I 2007/103.

<sup>36</sup> The »consultation mechanism« (see below) seeks to protect the municipalities from financial obligations imposed on them by federal or *Länder* laws.

<sup>37</sup> Article 8 paragraph 2 F-VG.

ments.<sup>38</sup> Under certain conditions, the municipalities may be endowed with subsidies earmarked for specific purposes.<sup>39</sup> However, under § 3 F-VG, the *Länder* are entitled to apportion their needs to a certain extent, as far as they are not covered by other revenues, to municipalities or municipal associations.

According to § 3 F-VG, the ordinary federal legislature is entitled to adopt ordinary legislation on tax equalisation. The Fiscal Equalisation Act (*Finanzausgleichsgesetz*, hereinafter FAG)<sup>40</sup> is usually re-enacted every four years following negotiations between the federation, the *Länder* and, on behalf of the municipalities, the Austrian Association of Towns and the Austrian Association of Municipalities. However, the federation clearly dominates in the negotiations, more or less forcing the other parties to agree to a draft Fiscal Equalisation Act, although this may be detrimental to their interests (»fiscal equalisation pact«). The Constitutional Court, when reviewing a Fiscal Equalisation Act, will presume that the Act has treated all parties fairly and equally, if a »fiscal equalisation pact« had been concluded between all parties before the Act became a law (Pernthaler, 2004: 416).

The *Länder* have made use of the limited financial space granted to them by the F-VG insofar as they adopted their own *Länder* Tax Acts and other more specific acts that include provisions with regard to exclusive local taxes and taxes shared between the respective *Land* and its municipalities. Under the *Länder* Apportionment Acts, municipalities are obliged to assign the *Länder* part of their revenues in order to cover financial needs of the *Länder*.

Furthermore, two constitutional concordats have been concluded between the federation, *Länder* and municipalities. Whereas constitutional concordats are normally only concluded between the federation and the *Länder* pursuant to article 15a B-VG, the municipalities, being represented by the Austrian Association of Towns and the Austrian Association of Municipalities, have been specifically entitled to take part in these two concordats.<sup>41</sup>

<sup>38</sup> Article 12 paragraph 1 F-VG.

<sup>39</sup> Article 12 paragraph 2 F-VG.

<sup>40</sup> Very recently, *Finanzausgleichsgesetz* 2008, BGBl I 2007/103.

<sup>41</sup> A particular Federal Constitutional Act had to be passed in order to empower the Austrian Association of Towns and the Austrian Association of Municipalities to conclude the concordat (BGBl I 1998/61 and Weber, 2000: 4.)

The first concordat establishes a so-called »consultation mechanism« according to which consultation must take place if one of the concluding parties intends to adopt legislation that would impose financial obligations on the others. If, however, the consultation committee, consisting of the representatives of all three tiers, does not reach an agreement, the party that intends the respective piece of legislation will be responsible for financing its own legislation (Bußjäger, 2000; Schäffer, 2001).

The second concordat establishes the Austrian Stability Pact (Gamper, 2002) which obliges the concluding parties to restrict their expenditure in order to meet the EU convergence criteria. Whereas the *Länder* are obliged to show an annual surplus and the federation must not exceed a certain deficit, the municipalities have to achieve at least a balanced budget.<sup>42</sup> If these conditions are not met minimally on average basis throughout a certain period of years, it will be possible to impose considerable sanctions on the defaulting tier.

These two recent concordats as well as the tradition of negotiating the »fiscal equalisation pact« follow the idea of a »three-layered« type of federalism (Pernthaler, 1984: 229) that not only includes the federation and the *Länder*, but also local government. In general, such a concept seems to be incompatible with the classic concept of federalism (Pernthaler, 1984: 397), but, if limited to the arena of fiscal federalism, may prove to be a pragmatic and politically efficient instrument that to some degree balances the federation's predominance also with regard to fiscal relations (Weber, 2005: 427 and Gamper, 2006: 81).

## IX. Perspectives

The Austrian Association of Towns and Austrian Association of Municipalities that usually represent the Austrian municipalities in relations with the federation and the *Länder* took part in the Austrian Constitutional Convention that, consisting of 70 experts, politicians, functionaries and lobbyists, attempted to draft a new Federal Constitution between June 2003 and January 2005 (Bußjäger, 2004; Bußjäger, 2005; Bußjäger, 2006).<sup>43</sup> On behalf of the municipalities, the two associations particularly

<sup>42</sup> A new Stability Act, covering the period between 2008 and 2013, is in the process of being implemented in federal and *Land* legislation.

<sup>43</sup> See [www.konvent.gv.at](http://www.konvent.gv.at).

required municipal representation in the second chamber of the Federal Parliament, together with the *Länder*, and general recognition as an equal partner in the arena of co-operative federalism. However, despite a private draft that was written by the Convention's chairperson and a rich collection of materials useful for further discussion, the Convention failed to reach its aim. Another attempt to draft a new Federal Constitution on the basis of the Convention's work was the establishment of a Special Parliamentary Select Committee on Constitutional Reform<sup>44</sup> that failed, too. Finally, following the new Coalition Government's political agenda, an even smaller group consisting of politicians and experts was set up in 2007.<sup>45</sup> Due to the constitutional majority of the Government in the Parliament, it has again become much easier to push through constitutional amendments. The recent Government's first major constitutional amendment has already been in force for some time,<sup>46</sup> the second, which is of an even more comprehensive nature, partly entered into force on 1 January 2008, whilst another part will enter into force later in the year.<sup>47</sup> The first constitutional amendment concerns the municipalities insofar as the active voting age must not be exceed 16 in any general elections (including those for the local councils or mayors) and the passive voting age must not exceed 18. Moreover, under certain conditions, postal voting is now possible not just for Austrian citizens that live abroad, but also in the Republic of Austria. The second constitutional amendment lacks a considerable number of provisions that had formed part of the original draft but were omitted after the draft had met harsh criticism from many sides. In particular, this concerns the establishment of the Administrative Courts in the *Länder* that, according to the draft, were proposed to be competent, among other matters, to decide as a second instance in local administrative procedures instead of a local authority, if not provided otherwise. The most recent amendment, however, does not particularly concern the municipalities, and it is unclear whether further constitutional amendments will follow in the near future.

The municipalities' demand to be regarded as a third partner in the Austrian federal system does not remain unheard, though. Again, the new stability pact and new fiscal equalisation pact are tokens of the munici-

<sup>44</sup> *Besonderer Ausschuss zur Vorberatung des Berichts des Österreich-Konvents*, set up in March 2005 (until July 2006).

<sup>45</sup> See *Regierungsprogramm 2007–2010*, on page 23 ([www.austria.gv.at](http://www.austria.gv.at)).

<sup>46</sup> BGBl I 2007/27.

<sup>47</sup> BGBl I 2008/2.

palities' involvement in the arena of fiscal policy. Nevertheless, the future of federalism and the future of local government in the Austrian three-tier-system remain an unfinished business.

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## THE »THIRD TIER« IN AUSTRIA: LEGAL PROFILES AND TRENDS OF LOCAL GOVERNMENT

### *Summary*

*In many states worldwide, the local level increasingly seeks constitutional recognition that values the municipalities' essential services for public welfare at the level closest to citizens. In federal states, this often leads to tensions between the regional and local levels since the »third tier« demands to be admitted as a third partner of the federal system, which sounds unorthodox to the classical doctrine of federalism. The Austrian Federal Constitution regulates the organisation and functions of the municipalities (Gemeinden) in principle, but leaves the details to the legislation of the nine Länder. In accordance with the European Charter of Local Self-Government, all local authorities are elected democratically, deriving their mandate either directly or indirectly from the local citizens. A large number of local functions are performed autonomously according to the principle of subsidiarity, whereas local authorities are bound to the instructions of federal or Land authorities if they perform delegated functions. Although the constitutional status of the municipalities does not generally approach that of the Länder, they are recognised as a »third partner« in the system of fiscal equalisation and national budgeting, where co-operation between the federation, the Länder, and the municipalities is closer than in other areas. In general, nevertheless, the municipalities have not succeeded in being treated as a constituent unit of the federal system yet, although they have been claiming their representation in the second chamber of the Federal Parliament for years. The major constitutional amendment that has just been enacted does not affect the municipalities in particular, and whether the planned reform of federalism and the Austrian administrative system – which could also be an advantage to the future position of local government in Austria – is realized in the near future, is still a pending question.*

Key words: local self-government – Austria; fiscal equalisation; municipal bodies; three-layered federalism; local autonomy; local democracy

## »TREĆA RAZINA« VLASTI U AUSTRIJI: PRAVNA REGULACIJA I TRENDOVI U LOKALNOJ SAMOUPRAVI

### Sažetak

*U mnogim državama sve se češće traži ustavno priznavanje činjenice da je djelovanje lokalnih samoupravnih jedinica od ključne važnosti za opće dobro na razini najbližoj građanima. U federalnim državama to često dovodi do napeitosti između razine federalnih jedinica i lokalne razine budući da lokalna samouprava zahtijeva da ju se prizna kao trećeg partnera u sustavu federacije, što se klasičnoj federalnoj doktrini čini poput hereze. Austrijski federalni Ustav regulira organizaciju i poslove općina (Gemeinden) u načelu, no detaljnu pravnu regulaciju prepušta na brigu devetorima federalnim jedinicama (Länder). U skladu s Europskom poveljom o lokalnoj samoupravi, sve lokalne vlasti izabiru se na demokratski način, a mandat im je izravno ili neizravno utemeljen na volji građana lokalne jedinice. Velik broj lokalnih poslova obavlja se autonomno, u skladu s načelom supsidijarnosti. O obavljanju poslova prenesenog djelokruga lokalne su vlasti podložne uputama federalnih tijela ili tijela federalnih jedinica (Länder). Iako ustavni status općina općenito nije jednak statusu federalnih jedinica (Länder), njih se priznaje kao »trećeg partnera« u sustavu fiskalnog poravnanja i donošenja državnog proračuna, gdje je suradnja između federacije, općina i federalnih jedinica (Länder) tješnja nego u drugim područjima. Međutim, općenito govoreći, lokalne samoupravne jedinice još nisu uspjele postići da ih se tretira kao konstitutivne jedinice federalnog sustava iako već godinama traže zastupljenost u Gornjem domu federalnog Parlamenta. Važan ustavni amandman koji je nedavno usvojen izravno se ne tiče lokalnih samoupravnih jedinica, a još se ne zna hoće li se planirana reforma federalizma i austrijskog upravnog sustava provesti u bliskoj budućnosti, što bi moglo koristiti budućem položaju lokalne samouprave.*

*Ključne riječi: lokalna samouprava – Austrija, fiskalno poravnanje, općinska tijela, trostupanjski federalizam, lokalna autonomija, lokalna demokracija*